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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 974

GEORGE F. MOORE,

Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation; SHELL OIL COMPANY, a Corporation; THE TEXAS COMPANY, a Corporation; RICHFIELD OIL CORPORATION, a Corporation; GENERAL PETROLEUM CORPORATION, a Corporation; TIDE WATER ASSOCIATED OIL COMPANY, a Corporation; and UNION OIL COMPANY OF CALIFORNIA, a Corporation,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the court of appeals (Pet. Appx., pp. 1A-60A) is reported in 251 F.2d 188.[1]

[1] *General Petroleum Corp. v. District Court*, 213 F.2d 689, cited in the petition (p. 1) is a collateral opinion involving pretrial proceedings which is not relevant on this petition. Four of the seven respondents were not parties to that proceeding.

JURISDICTION.

The judgment of the court of appeals was entered on November 6, 1957. A timely petition for rehearing was denied on February 10, 1958. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED.

The statute involved, commonly called the "Federal Business Records Act," 28 U.S.C. 1732 (62 Stat. 945), provides:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

QUESTIONS PRESENTED.

The questions presented as stated by petitioner (Pet., pp. 2-3) are inaccurate and rest upon an erroneous representation of the record.

The true question presented is:

Did the court of appeals, at an interlocutory stage of this case and on the facts of this particular record, err in holding that numerous documents, concededly prejudicial, were erroneously admitted by the trial court as "business records" within the meaning of the Federal Business Records Act?

PRELIMINARY STATEMENT.

Petitioner brought this suit under the Sherman Act for treble damages. A jury returned a verdict in his favor. On several grounds the court of appeals reversed the judgment and remanded the case to the District Court for the Western District of Washington for a new trial. Petitioner does not seek review of some of these grounds and concedes that they require that the case be retried in any event (Pet., p. 23, n. 38). The rulings of the court of appeals of which petitioner complains, and on which petitioner seeks an interlocutory opinion by this Court, turn upon the particular facts of this case. These rulings are clearly correct. They are not in conflict with any other decision. They are in accordance with the decision of this Court in *Palmer v. Hoffman* (1943) 318 U.S. 109, and with the decisions of every other court which has construed the Federal Business Records Act. The petition involves no novel question or question of general importance.

STATEMENT OF THE CASE.

Petitioner, owner of a service station on Fourth Avenue South in Seattle, Washington, was a Tide Water dealer for many years. Falling into bickering with Tide Water, he was given a termination of his supply contract by that company as of July 30, 1952. In the month following he closed his station (Pet. Appx., pp. 3A, 4A, 24A).[2] In October he brought this suit, claiming that respondents had refused to sell him gasoline. He charged a sweeping conspiracy to control and regulate gasoline prices and to monopolize and dominate gasoline distribution (Pet. Appx., pp. 21A, 22A). Respondents Union and General denied that they had refused to supply him, insisting that they were willing to sell but that he declined to buy from them except at a cut-rate discriminatory price (Pet. Appx., pp. 9A-21A). The other respondents admitted that they declined to sell to him, each contending that it did so for a legitimate, independent business reason (Pet. Appx., p. 25A). All denied conspiracy. From a jury verdict and judgment in petitioner's favor, respondents appealed.

One ground of the appeal was that, even assuming that all petitioner's evidence was competent, it failed to support a finding of conspiracy or of a refusal by Union or General to sell. Proceeding first on this assumption, the court below reviewed the evidence with painstaking care. It concluded (Pet. Appx., p. 22A) that "the evidence does

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[2]"Pet. Appx." refers to the opinion of the court below appearing in the appendix to the petition. We refer to the opinion rather than the record for the background facts, since they are not here in dispute and petitioner accepts these facts as stated by the court below.

not provide substantial support for a jury finding that all or any of the appellants entered into and carried out an agreement, combination, or conspiracy having the magnitude and ramifications pictured in the complaint." But it held that the jury "may have found" a conspiracy of lesser scope, namely, one "to control price cutting and curb-sign advertising by refusing gasoline to dealers whose severe price cutting and persistent curb-sign advertising bring them into controversy with their present suppliers" (Pet. Appx., p. 23A). Assuming that this lesser conspiracy was what the jury found, and proceeding on the principle that all of the evidence must be considered in the light most favorable to petitioner (Pet. Appx., p. 36A), it held the verdict supportable (Pet. Appx., p. 36A).

But, contrary to the statement in the petition that the court "found there was substantial *competent* evidence to support the verdict"[3] (Pet., p. 9), the court found that the evidence required to support the verdict was *not* competent. That it was *not* was another and major ground of the appeal. The evidence held incompetent consisted of literally hundreds of papers containing opinions, conclusions, conjectures, rumors and hearsay, in many instances even without identification of the writer or evidence of his duties or authority. The facts are summarized in the opinion below:

> "Appellants objected to the introduction of most of these exhibits * * * on the ground, among others, that they constitute hearsay, and that no foundation had been laid for their admission under any exception to the hearsay rule.

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[3]Italics throughout the brief are added unless otherwise indicated.

* * * The trial court held that [the] exhibits * * * were admissible under the exception to the hearsay rule which applies to business records. * * *

* * * While several hundred exhibits of this kind are said to have been improperly admitted, our attention is specifically directed to 119 such exhibits. In their specifications of error, appellants provide detailed references and arguments as to 46 of these exhibits, contending that they exemplified both the impropriety of what was done and the prejudice which resulted. Six exhibits or series of exhibits, selected for illustrative purposes, are dealt with at length in the briefs" (Pet. Appx., pp. 37A-38A).

"In most instances * * * it was not established that the internal procedures of the company required that such writings be prepared, transmitted, and filed systematically, or as a matter of routine.

Concerning almost all of the items * * * the nonexistence of any such company procedure seems almost self-evident. * * *

If there was any systematic or routine procedure being followed in the preparation and filing of such writings, the burden was upon appellee to prove it. He failed to do so, at least with regard to most such exhibits. * * *

With regard to few, if any, of these exhibits was there testimony indicating that it was a regularly established business procedure to make such memoranda or records at the time of the act, transaction, occurrence, or event therein described, or within a reasonable time thereafter. In numerous instances, the writings themselves reveal that they had not been prepared with any particular or general time limit in mind. Some of the documents contain references to

acts which occurred or policies which were established a considerable time before the writing was prepared. Others do not refer to past acts and events at all, but contain predictions as to what would or should occur in the future" (Pet. Appx., pp. 43A-44A).

"That the introduction of these exhibits was prejudicial to appellants is not denied. All of the 46 exhibits mentioned in the specifications of error were referred to, and many were quoted, in the argument to the jury made on behalf of appellee" (Pet. Appx., p. 46A).

The court held these exhibits incompetent but held (Pet. Appx., p. 47A):

"On a new trial, however, a proper foundation may be supplied for the admission of some of these documents, and other admissible evidence may be found in substitution of evidence here found to be inadmissible. The attainment of substantial justice therefore requires that the action be not dismissed, but that it be remanded for a new trial."

ARGUMENT.

The decision below is clearly correct and is not in conflict with any decision of this Court or of any other court of appeals. In essence what petitioner seeks is to have this Court apply the elementary rules of evidence to hundreds of exhibits, considered in the light of the authenticating evidence in the voluminous record of this particular case. This is a function of the courts of appeals, not of this Court.

Nevertheless we briefly refer to the record and to the authorities to demonstrate the correctness of the ruling of the court below.

The Federal Business Records Act (quoted supra, p. 2) provides that:

> " * * * any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

In *Palmer v. Hoffman* (1943) 318 U.S. 109, this Court pointed out that the words "regular course of business" find their meaning in the legislative history (p. 112) and in the "several hundred years of history behind the Act" (p. 115). The Court referred to the "numerous books and records essential to its [a business's] conduct or useful in efficient operation" and said (318 U.S. 112):

> "Though such books and records were considered reliable and trustworthy for major decisions in the industrial and business world, their use in litigation was greatly circumscribed or hedged about by the hearsay rule—restrictions which greatly increased the time and cost of making the proof where those who made the records were numerous. 5 Wigmore, Evidence (3d ed., 1940), §1530. It was that problem which started the movement towards adoption of legislation embodying the principles of the present Act. See Morgan et al., The Law of Evidence, Some Proposals

for its Reform (1927) c. V. And the legislative history of the Act indicates the same purpose."

The types of documents which the Court referred to as those which the statute was intended to cover are "payrolls, accounts receivable, accounts payable, bills of lading and the like" (p. 114). This list, of course, is not all-inclusive, but the test, as this Court said, is the inherent "probability of trustworthiness of records" (i.e., trustworthiness of the *contents* of the records) "because they [are] routine reflections of the day-to-day operations of a business."[4] The test is not "regularity of preparation", nor the fact that the paper was made in "any 'regular course' of conduct which may have some relationship to business," but the "character of the records and their earmarks of reliability * * * acquired from the source, origin and the nature of their compilation" (318 U.S. 113-114).

If a paper meets these tests it is, of course, admissible not merely *against* the party whose record it is but *in his favor* as well. This is true because, as this Court pointed out in *Palmer v. Hoffman,* the paper must meet the test of inherent "trustworthiness of records" as "routine reflections of the day-to-day operations of a business." In

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[4]"It ought to appear that the document was itself prepared under a routine which warrants its reliability * * * " *(Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co.* (2 Cir. 1927) 18 F.2d 934, 938, Learned Hand, J.), cited by this Court with approval in *Palmer v. Hoffman.*

"The entry offered must of course be a part of a series of entries or reports, not a casual or isolated one. This is necessarily involved in the reasons on which the rule is founded. Thus, a single entry in a book * * * or a memorandum casually made, would not answer this requirement" (V Wigmore on Evidence (3d Ed. 1940) sec. 1525, p. 373).

this regard documents admissible under the Federal Business Records Act are to be sharply distinguished from documents admissible as "admissions." Admissions are admissible only *against* the party who made them. To confuse these concepts would be to permit a party to manufacture evidence in his own favor by simply writing something and placing it in a business file. As feared in *Palmer v. Hoffman* (318 U.S. 113), anyone could keep a record to prove anything. This distinction is constantly overlooked in the petition and accounts for much of its confusion.[5]

Prior to the trial of this case petitioner by extensive discovery procedure obtained thousands of papers from the files of all of the respondents.[6] These papers ranged in character from documents prepared and maintained as "business records" to random handwritten notes sent in from the field by salesmen or even unidentified persons reporting gossip about what other companies were doing and about what the reporter saw or heard or speculated or prophesied. From the latter petitioner culled certain papers and offered them in evidence, first, as "admissions" of the particular respondent from whose files the docu-

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[5]See, for example, petitioner's argument that certain papers were admissible under section 1732 because "the employee's written statements were offered against (not for) respondents" (Pet., p. 13).

[6]On this discovery respondents, of course, were required to produce papers, even though inadmissible, if they appeared "reasonably calculated to lead to the discovery of admissible evidence" (Rule 34, Federal Rules of Civil Procedure). It is elementary that the mere fact that a paper is produced from one's files is without significance to bring it under § 1732 (*National Labor Relations Bd. v. Sharples Chemicals* (6 Cir. 1954) 209 F.2d 645, 653; *Schmeller v. United States* (6 Cir. 1944) 143 F.2d 544; *Woods v. Swank* (5 Cir. 1949) 170 F.2d 885).

ments were obtained. The trial court correctly rejected these exhibits as "admissions" because petitioner failed to prove the authority, and in many cases even the identity, of the writer (R. 2291, 2201-2208, 2646, 2703-2704). Thereupon petitioner resorted to the Federal Business Records Act, and, thereafter, the court over the objection of respondents received into evidence as a "business record" virtually any paper obtained from the files of any respondent.

An illustration of the manifest error of the trial court in this regard is plaintiff's exhibit 6-B which petitioner himself quotes in Appendix B to the petition. It purported to be a report by an unidentified salesman named "Art" to respondent Union's local manager about a Tide Water dealer. The witness questioned about the document knew nothing about it but guessed what it was from what "appears" (R. 3735). It states:

> "Mr. Chris Pieren, Associated dealer at 7120 East Marginal Way told me today that Associated has removed off policy discounts from their Self-Serve dealers and has discontinued selling to them unless they raise their posted price to the regular retail level.
>
> Bill Scholdt, operator of Bill's Gas Well at 10300 East Marginal Way, said the Harris Petroleum had been approached by two Associated Self-Serve dealers formerly supplied by them for their further supply since Associated was going to take away their discount."

The collection of hearsay is glaring. The unidentified salesman reports that someone named Pieren says that Associated (Tide Water) had done thus and so. If the salesman instead of his supposed report had been on

the witness stand, he would never have been permitted to testify that Pieren said anything. And what Pieren, not an employee of Associated, said Associated said was hearsay upon hearsay. The second paragraph is even worse. It states that one Scholdt (not a party to the suit) *said* that Harris Petroleum (also not a party) *had told him* that some Associated dealers (unidentified) *had told* Harris Petroleum that Associated was going to take away their discount. And yet the trial court admitted this paper from Union's files as competent evidence under the Federal Business Records Act of the truth of its contents, i.e., as evidence that Associated was removing discounts from Self-Serve stations (R. 3803).

Petitioner argues that writings attributing information to others, thus constituting multiple hearsay, are admissible under the provisions of section 1732 that " 'lack of personal knowledge' by the maker 'shall not affect its admissibility' " (Pet., p. 17). This provision is not dissociated from the other requirements of section 1732 but is addressed to situations such as that of the bookkeeper who enters figures furnished him by the shipping clerk, taken from the bills of lading and the like, i.e., to situations where the entrant obtains the data from one whose own duties to the employer include transmitting the information for recording. Thus in *United States v. Grayson* (2 Cir. 1948) 166 F.2d 863, the court (per Learned Hand, J.) said (p. 869):

> "But the 'Sheets' did not become competent evidence of the truth of all statements in them, because it was the course of the dealers' business regularly to record information which they got from others. * * * The statute did not mean to make competent whatever the

> entrant picked up from random sources, although it was part of his business to pick up information where and when he could and make a record of it. The 'act, transaction, occurrence or event' which the entrant records must be one of which either he has knowledge, or which he learns from a declarant who shall 'in the course of the business transmit the information for inclusion in the memorandum.' 'Multiple hearsay' is no more competent now than single hearsay was before."[7]

As stated in *United States v. United Shoe Machinery Corporation* (D.Mass. 1950) 89 F.Supp. 349, 354, if the entrant does not himself know the facts, he must obtain them from a fellow employee who "had personal knowledge" or who was informed "by another of defendant's employees who had personal knowledge."[8]

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[7]Accord: *Gencarella v. Fyfe* (1 Cir. 1948) 171 F.2d 419; *Amtorg Trading Corporation v. Higgins* (2 Cir. 1945) 150 F.2d 536; *Bibbington v. Cal. Western Etc. Ins. Co.* (1947) 30 Cal. 2d 157, 160, 180 P.2d 673, overruled on another ground, *Zuckerman v. Underwriters at Lloyd's* (1954) 42 Cal.2d 460, 267 P.2d 777, construing "the liberalized provisions contained in [the California Shop Book Act]"; and *New York Life Ins. Co. v. Taylor* (D.C. Cir. 1945) 147 F.2d 297.

In *Clainos v. United States* (D.C. Cir. 1947) 163 F.2d 593, Judge Prettyman, speaking for the court, pointed out (p. 595):

> "That Rule is confined to records kept in the course of the business of which the transaction was a part. * * * Thus, for example, if it were part of the occupation of a person or concern, such as a newspaper representative, an insurance company, or a statistical agency, to keep a record of certain kinds of events occurring in a community, that record would not be admissible as evidence of the events * * *."

In accord: *New York Life Ins. Co. v. Taylor* (D.C. Cir. 1945) 147 F.2d 297, 304; *Matthews v. United States* (5 Cir. 1954) 217 F.2d 409, 414; *Gilbert v. Gulf Oil Corporation* (4 Cir. 1949) 175 F.2d 705, 710.

[8]The petition (pp. 12 and 14), in support of an assertion that documents of the nature involved in this case have been admitted

Exhibit 6-B, quoted above, in addition to being a collection of second and third-hand hearsay, is replete with *conclusions* and thus illustrates another common vice of petitioner's evidence. Pieren's hearsay did not relate *what* Associated had said; it stated a *conclusion* that Associated would not sell certain dealers "unless they raised their posted price". One cannot tell whether "Associated" said this, or whether it was Pieren's conclusion, or whether it was "Art's" conclusion of what Pieren said. Neither Art nor Pieren, if on the witness stand, would ever have been permitted to testify in this way.

Designed to create a certain exception to the hearsay rule, Section 1732 did not create exceptions to *other* rules of *competency*. It does not permit surmise, opinion or conjecture. It provides that a "writing or record * * * made as a memorandum or record of any act, transaction, occurrence or event" shall in certain circumstances be admissible, but a statement of surmise, opinion or conjecture, or of what someone may do in the future, is not a record of an "act, transaction, occurrence or event."

The admissibility of an opinion must be found in some other rule of evidence than Section 1732, such as the

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in other antitrust cases under the Federal Business Records Act, cites this case. It is plainly against him. Judge Wyzanski's detailed exposition of the principles excluding hearsay and governing admissions is in strict accord with the law as expressed in the opinion of the court below (89 F.Supp. 352, et seq.). With respect to "civil antitrust cases tried *without a jury*," Judge Wyzanski felt that some departure from the standard rules might be tolerable, but he agreed there could be no such departure in a jury trial.

Petitioner also cites *United States v. General Motors Corporation* (7 Cir. 1941) 121 F.2d 376, 409, but as the court below noted (Pet. Appx., p. 45A), in that case the errors assigned were not argued and the appellants admitted that none of the matters was prejudicial; moreover, the nature of the reports and the circumstances in which they were made and the basis of the objections do not appear.

rule that would permit the maker of the report to state an expert opinion in the field of his expertise if he were on the witness stand.

But in this case no experts are involved. The exhibits are simply full of laymen's surmises or conclusions. *United States v. United Shoe Machinery Corporation* (D. Mass. 1950) 89 F. Supp. 349, 355 (Wyzanski, J.):

> *"Even these cases do not go so far as to permit the introduction in evidence of written opinions about facts of which the entrant and those with whom he is associated in business have no personal knowledge. The advocates of a broad construction of 28 U.S.C.A. § 1732 would not favor admission of such evidence."*

To the same effect is *United Mine Workers of America v. Patton* (4 Cir. 1954) 211 F. 2d 742, certiorari denied (1954) 348 U.S. 824.

One further example from numerous others in the record will suffice. Plaintiff's Exhibit 5-A reads:

> "To Larry May 10, 1952
> At this writing S O Co. have removed all restrictions and are soliciting any and all biz.
> Walt."

This was a handwritten scrawl in an unidentified handwriting on a piece of paper with the printed name "Union Oil Company of California" at the top and the notation "Form 405-A." The *only* identification was that "Form 405-A" is a blank form used at Union for any kind of notation or memo (R. 4045-4046). There was no evidence as to who Walt or Larry was, nor any evidence of where the unknown Walt obtained his information. The record discloses only that the note came from Union's files and had been read by some of its employees (R.

3911-3917).[9] Yet it was introduced by petitioner as a business record to prove the truth of its contents, i.e., that *Standard* (not Union) was taking new business at the time (R. 3926).[10]

Grossly erroneous are the assertions in the petition that "each document was concededly 'made in keeping with systematic and routine procedures, and concerns a matter of importance to the business' " (Petitioner's Question I, p. 2); that there was "testimony and other proof that each writing was made and kept in the regular course of business" (Question II, p. 2); that "No witness for respondents ever asserted that any particular exhibit was not a usual and ordinary business document in form

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[9]The witness through whom petitioner attempted to "authenticate" this paper testified (R. 3911, 3916):

"A. It was not in any way regular. It just seems to be a note one of the boys sent in. I don't know who exactly signed it.

* * * * *

Q. He did it in connection with his job, did he not?

A. I *assume* he did, yes.

* * * * *

A. It is not a regular document. It is very irregular, very unusual".

[10]Standard's evidence was that it refused to sell to petitioner because of an acute product shortage arising out of the Korean War, and the unidentified gossip that it was "soliciting any and all biz" was false (R. 5195-5199). Yet petitioner's counsel argued to the jury (R. 6829-6830):

"On May 10, 1952, here is what the man in the business says:

'At this writing S.O. Co. have removed all restrictions and are soliciting any and all biz.'

* * * * *

Something happened about that time that made the Standard Oil Company go out and start soliciting business, * * *

* * * * *

That was written right at the time it happened, May 10, 1952; and the Standard Oil Company comes up here and tells you, 'We didn't have any gasoline. We weren't soliciting anything. We weren't taking any business.' "

or subject matter"; that "no one disputed the authenticating proof even when the sender or recipient of a writing was a witness" (p. 7). Rarely was the sender or recipient a witness at all. And, indeed, the trial court denied respondents the right to show facts contrary to each of the foregoing assertions.[11]

As noted above, this Court in *Palmer v. Hoffman* (1943) 318 U.S. 109, 112, 115, pointed out that the words "regular course of business" are words of art, finding their meaning in the legislative history and the "several hundred years of history behind the Act." Nevertheless, over constant objection of respondents, the trial court not only permitted petitioner's counsel to ask, but directed them to ask, the witnesses through whom they attempted to lay a foundation, simply, in the words of the statute, whether the documents were "made in the regular course of business" and whether it was the "regular course of business to make the documents" (e.g., R. 3015). It overruled objections that this called for a layman's legal

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[11]For example, to support objection to certain documents, one appellant asked that ruling be deferred until it could examine on *voir dire* or cross-examination (R. 3549) and make

> "an offer of proof * * * that [the witness] would testify that he did not produce or select this document for production; * * * that he had no knowledge of whether this document was ever signed or mailed or received * * * ; that he has no knowledge of the subject matter of the letter or interoffice memorandum; that he does not know who actually prepared it; that he does not know who made the penciled notations and other writings on the document; and whether those were made at the time the interoffice memorandum was made, or whether it was made later; * * * that, in fact, he never saw this document until it was shown to him shortly before the trial" (R. 3646-3647).

Petitioner objected to the offer as immaterial (R. 3647). Despite renewed request for permission to examine on *voir dire* (R. 3715), the court admitted the documents (R. 3719).

conclusion (R. 3015-3016) and that the witness should be asked for specific factual data as to when, why and under what circumstances the document was made and the manner of its keeping (R. 3500-3502). The court even directed petitioner's counsel to ask the witnesses what *they understood* by the term "regular course of business" (R. 3882). Endless pages of the transcript were consumed in this manner; the witnesses were baffled as to what they were asked; the utter confusion occasioned by the court's rulings can be appreciated only by reading the record.[12]

Frequently petitioner's counsel did not even ask the witness whether a document was prepared in the "regular course of business" but merely showed him a paper he had never seen before and asked him to guess about the document from its appearance.[13]

Petitioner asserts that the "reason for or probable consequences of economic action in the market-place is admissible in an antitrust action" (Pet., p. 16). This, of course, is true, but petitioner is confusing *relevance* with *competence*. No rule permits rumors of unidentified per-

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[12]See, e.g., R. 3882-3887.

[13]E.g., all that the witness (a Union employee) knew about Pl. Ex. 6-A (R. 3803, a handwritten memorandum from an unidentified "Art" found in Union's files and reporting conclusions and hearsay about what Tide Water was doing) was what he saw by looking at it (R. 3724). When again asked (R. 3726),

> "Does it not *appear* to you, Mr. Martin, that Plaintiff's Exhibit 6-A is a document prepared in the regular course of business of the Union Oil Company of California?"

the witness answered, "It could have been" (R. 3726), but

> "I would have no way of knowing. I don't know the parties involved. I don t know what they were doing. I don't know what time it was done. The letter has a date. I know nothing about the transactions, so that is why I have to say it could have been" (R. 3727).

sons' reasons to serve as evidence. This same confusion permeates petitioner's choice of citations. For example, he amasses decisions of this Court as support for the assertion (Pet., p. 11, n. 9) that documents are usually the best and often the only relevant evidence in antitrust cases. This again is true, but obviously the documents must be competent.[14] The same confusion between relevance and competence permeates other statements and arguments in the petition.[15]

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[14]In *Ethyl Gasoline Corp. v. United States* (1940) 309 U. S. 436, 446, "The case was tried on an agreed statement of facts which was incorporated in the findings of the trial court * * *." Other cases cited in n. 11, p. 9, and n. 42 on p. 24 are equally beside the point. Apart from *Schine Theatres v. United States* (1948) 334 U. S. 110, 116, 117, none of them involved or referred to any question of admissibility of evidence, and in the *Schine* case the sole question raised and decided was whether there was a conspiracy established by independent evidence as a foundation for introduction of certain declarations of some conspirators against all under the co-conspirator rule. Note 24 of *United States v. Socony-Vacuum Oil Co.* (1940) 310 U. S. 150, 183, refers to a letter of one Jacobi containing the same statements as Jacobi testified to on the witness stand. The quotation after the citation of *Hartford-Empire Co. v. United States* (1945) 323 U. S. 386, refers to "first-hand information", whereas the essence of the present case is that the papers were a collection of second, third and fourth hand rumor. Petitioner's reference in *United States v. Univis Lens Co.* (1942) 316 U. S. 241, 245, is to the "Corporation's instructions to its field representatives". Such official instructions would obviously be admissible as an act of the corporation, but respondents urged no error in receiving evidence of instructions. In *United States v. National Lead Co.* (1947) 332 U. S. 319, 327, certain letters were known to and shown to have been ratified by top officials of DuPont.

Other citations of petitioner are of the same character, i.e., they relate to "relevance" or "weight" but not "competence" or "admissibility". Thus in *United States v. Corn Products Refining Co.* (S.D.N.Y 1916) 234 Fed. 964 (Pet., p. 13, n. 17) the court merely discussed the weight of certain memoranda.

[15]For example (Pet., p. 11)

"The decision below holds that the recorded course of conduct of large corporations is inadmissible as a matter of eviden-

Finally petitioner refers, as he did in the court below, to the admissibility of the documents as "admissions." The short answer is given by the court of appeals (Pet. Appx., pp. 47A-48A):

> "Appellee, however, argues that, if these exhibits were inadmissible under § 1732, they were, in any event, properly received as extrajudicial admissions of a party-opponent (herein referred to as admissions).
>
> Examination of the record indicates that appellants are correct in stating that these exhibits were admitted as business records, and not as admissions. Counsel for Moore, on two or three occasions, sought to admit documents of this kind as admissions. Each time, the trial court rejected this contention, and made it clear that the writings were receivable, if at all, only as records made in the regular course of business. Conforming to this ruling, the foundation evidence was directed only to the requirements of § 1732 as a ground for admission.
>
> All of the discussion and argument of counsel concerning the admissibility of individual exhibits, with

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tiary law when that course of conduct must be proved to show a violation of substantive law."

The court below merely held that the proof must be by competent evidence.

Again, petitioner erroneously states (p. 15) that the court "held that reasons given for economic actions of others were not proper subjects for expert opinion". No such question was involved. In n. 19, p. 16, petitioner cites a number of cases which merely hold that where a man's state of mind is a relevant issue, it may be deduced from his remarks, which therefore are admissible. But in these cases the remarks were proved by testimony of a witness on the stand, who heard them. Furthermore, the remarks were not admissible "to prove the truth of the facts recited." *Greater New York Live Poultry C. of C. v. United States* (2 Cir. 1931) 47 F.2d 156, 159.

the possible exception noted in the last footnote, were directed to that inquiry. * * * As a result, the challenged exhibits were received only on the basis that they constituted memoranda or records made in the regular course of business.

* * * Appellants have had no trial court opportunity to inquire into the factual basis for admission of the exhibits on any ground other than that they were business records."[16]

Petitioner also complains briefly of certain principles stated by the court below in the course of its opinion with respect to admissions (Pet., pp. 21-23). These statements merely summarize elementary law.[17]

The decision of the court below leaves it open to petitioner to introduce at retrial all competent evidence, oral or written, concerning any relevant matter. His statements that under the decision "no antitrust case can be tried

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[16]While the question is not presented at this stage of the case, petitioner's failure to bring his papers within the elementary rules relating to admissions was glaring. Often the writers of the papers were not even identified, and much less was there any evidence of their authority. Thus, for example, Exhibit 5A (supra, p. 15) was admitted over the objection that there was (R. 3917)

"* * * no identification of the source of the information in this document; no identification of the sender of the document; no showing of authenticity, authorization, adoption or use by Union Oil Company regarding this particular document * * *."

[17]The circumstances in which a statement by an employee of a corporation is admissible against the employer *qua* its statement is covered in Mechem on Agency (2d ed.) sec. 1784; Restatement of Agency, sec. 287; Morgan, "The Law of Evidence, 1941-1945," 59 Harvard L. Rev. 481, 559; Morgan, "The Rationale of Vicarious Admission," 42 Harvard L. Rev. 461; *Lever Bros. Co. v. Atlas Assur. Co.* (7 Cir. 1942) 131 F. 2d 770, all of which the opinion below cites and summarizes, and in *Pekelis v. Transcontinental & Western Air* (2 Cir. 1951) 187 F. 2d 122, 127, 128, certiorari denied (1951) 341 U. S. 951, and Judge Wyzanski's opinion in *United States v. United Shoe Machinery Corporation* (D. Mass. 1950) 89 F. Supp. 349, 352, 353.

within the confines of the Ninth Circuit " (Pet., p. 24) and that "none of the substantial anti-trust cases reaching this court should have been decided adversely to the defendant" (p. 24) are simply hyperbole.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
May 16, 1958.

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